

EVIDENCE — Best evidence rule — Rule does not apply to tapes of conversations when a participant in the conversations testifies — Revised 3/2010

In *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976), the defendants met with an informer in a motel room and the informer audiotaped their conversation. The informer testified at trial about the conversations that took place in the motel room. The defendants were convicted of importing and distributing heroin. On appeal, they argued that the trial court erred in admitting the informer's testimony rather than the audio tapes because the audio tapes were the "best evidence" of the conversations. The Ninth Circuit disagreed, noting that the issue in the case was not "the content of the tapes" but "the content of the conversations." *Id.* at 1053-54. The Court noted that the tapes were not introduced into evidence because the recording quality was too poor, but stated:

The tape recordings, if intelligible, would have been admissible as evidence of those conversations. But testimony by the participants was equally admissible and was sufficient to establish what was said.

Id. at 1054.

In *United States v. Workinger*, 90 F.3d 1409 (9th Cir. 1996), Workinger was interviewed by his ex-wife's lawyer (apparently in conjunction with a divorce proceeding). He affirmed that he would tell the truth during the interview, and his ex-wife's lawyer tape-recorded the interview. Pursuant to the divorce lawyer's standard procedure, his secretary, who was not present at the interview, transcribed the tapes and then erased them. Workinger was later indicted on various tax offenses. During the tax offense trial, the prosecution introduced a transcript of the interview into evidence against Workinger and read it to the jury verbatim. Workinger was convicted and on

appeal, he contended that the admission of the transcript violated the "best evidence rule" because the prosecution did not produce the tape. *Id.* at 1415. Citing *Gonzales-Benitez*, the Court noted that, while the tape itself would have been the best evidence of the content of the interview, the tape had been erased and was unavailable. The Court stated that use of the tape did not violate Rule 1004 of the Federal Rules of Evidence. *Workinger*, 90 F.3d at 1415. The court also noted, "We, of course, are well aware of the fact that a tape recording cannot be said to be the best evidence of a conversation when a party seeks to call a participant in or observer of the conversation to testify to it. In that instance, the best evidence rule has no application at all." *Id.* In other words, the "best evidence" of a conversation is the live testimony of one of the people involved in the conversation.